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No. 1283

IN THE

Supreme Court of the United States

October Term 1967

STATE ex rel. WILMER RHODES,
Appellant

vs.

GRANT K. COOK,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEE'S MOTION TO AFFIRM

ROBERT E. SCHILLBERG
Prosecuting Attorney for
Snohomish County, Washington

JOHN F. WILSON
Special Deputy Prosecuting
Attorney
Attorneys for Appellee

Office and Post Office Address:
Court House
Everett, Washington

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APPELLEE'S MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Supreme Court of the State of Washington be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

ARGUMENT

I THE SNOHOMISH COUNTY PLUMBING CODE DOES NOT VIOLATE "..., NOR SHALL

ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; . . ."[1] BY REQUIRING LICENSING OF OWNERS OF PROPERTY HELD FOR SALE OR RENTAL PRIOR TO THE ISSUANCE OF A PLUMBING PERMIT.

There is no issue in this case as to the legitimate exercise of the police power in the general requirement of Section 1.10(a)[2] of the Uniform Plumbing Code requiring licensing of plumbers, at least insofar as it relates to "commercial plumbers" or plumbing done "for others."[3] There has at no time in this

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[1] Amendment XIV § 1, United States Constitution.

[2] "No permit shall be issued to any person to do or cause to be done any plumbing or drainage work regulated by this code, except to a person holding a valid unexpired and unrevoked Plumbing Contractor's Certificate of Qualification or Registration as required by Section 2.3, except when and as otherwise hereinafter provided in this section."

[3] ". . . It is not the contention of petitioner that it is beyond the power of Snohomish County to license and otherwise restrict the activities of commercial plumbers for the purpose of protecting the public health and welfare. That such is a valid exercise of the state's police power was established in *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930) and affirmed in *City of Spokane v. Latham*, 181 Wash. 161, 42 P. 2d 427 (1935). Petitioner also agrees with the following statement of the prevailing law in the United States:

" 'While there are some authorities to the contrary, it is now generally recognized to be a legitimate exercise of the police power in the interest of the public health, safety and welfare for the State or municipal subdivision to require registration, exam-

case been any attack upon the fairness or procedure in practice or theory or any other aspect of the licensing procedure itself. The appellant concedes on page 16 of the jurisdictional statement that, "the actual experience under the Code, . . . is that the comprehensive requirements of the Code have compelled a healthy plumbing result, . . ."

Appellant states on page 6 of his Jurisdictional Statement that "it is clear that (his) work will fully meet the code standards." This assumes that the

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ination and licensing of those who install plumbing or who do electrical installation *for others.*' (Emphasis added) 41 Am. Jur. 667-68." Brief of Appellant (Petitioner) presented to the trial court, set forth at page 28 of the transcript.

"Appellant concedes that licensing of commercial plumbers is reasonably related to the public health and safety. Likewise, it must be conceded that one who does any amount of plumbing for others than himself and his immediate family, although it be more limited than that done by commercial plumbers, is in a position similar to commercial plumbers, and can be required to be certified as to requisite skills." Holding of the Washington State Supreme Court, page 4a, Appellant's Jurisdictional Statement.

"This requirement was not at issue in this case. Appellant conceded the propriety of the licensing requirements being applicable to plumbing contractors or plumbers who hold themselves out for hire. Appellant objected only to having to become a plumbing contractor or commercial plumber in order to do plumbing work on the single-family house which he owned." Footnote 4, page 9, Appellant's Jurisdictional Statement.

appellant has the requisite skill to adequately do the work. This fact has never been pleaded or proven in this case nor has any attempt been made to demonstrate this fact by passing the requisite tests required to become licensed. Alternatively or conjunctively, this assumes that the licensing requirements of the code have no bearing upon public health or safety as the other code requirements of standards of materials and inspections provide adequate safeguards. This later assumption is directly contrary to the holding of the Washington Supreme Court.[4] This is also contrary to the conceded need for the

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[4] "Although one who does plumbing in a residence which he intends to rent or sell is subject to the laws of landlord-tenant, or of contract, such laws are not designed to protect the public health and safety. Nor are such laws adequate for this purpose.

"Testimony at trial indicated that some plumbing defects are extremely difficult to detect, even under the detailed inspection required by the Plumbing Code, and that the plumbing inspectors rely to some extent upon the skill and care of commercial plumbers. Licensed plumbers generally do better work than do nonlicensed plumbers. It is, therefore, reasonable to limit noncertified work, and even though all work must be inspected, there is a legitimate reason for the certification requirement set out in section 1.10.

"We cannot say that there is no reasonable relation to public health and safety in the requirement that non-resident homeowners be licensed to do plumbing for others; nor can we say that appellant has been arbitrarily deprived of a lawful right." Page 5a, Appellant's Jurisdictional Statement.

licensing of commercial plumbers.[5] No authority or reason has been cited related to due process for drawing a distinction based upon ownership of property in regard to the need for licensing. The argument that inspection provides adequate safeguards against dangerous plumbing applies with more force to the work of commercial plumbers. This argument attacks directly the conceded need for the licensing of commercial plumbers.

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[5] See footnote 1, *supra*, also, Section 41, Am. Jur. 662, wherein it states:

> "OF PLUMBERS. While there is some divergence of opinion, the great weight of authority in this country is to the effect that the business of plumbing is so intimately connected with the public health, especially in large centers of population, as to be the proper subject of police regulation by the legislature or by municipal corporations and other local governmental units acting under delegated powers from the state. It is hardly open to question that defective plumbing and plumbing which is not skillfully executed or done upon proper scientific principles greatly endangers the health of the public in such localities, being conducive to the creation and spread of epidemic diseases of a virulent and dangerous character. And it follows that the state may impose restraint upon the business or work of plumbers by any reasonable regulations calculated and necessary for the purpose of insuring a character of plumbing which will not endanger the safety or health of the public, or for the protection of the public against the dangers of careless and inefficient work, without infringing the constitutional right of the citizen to pur-

II THE SNOHOMISH COUNTY PLUMBING CODE DOES NOT VIOLATE ". . . NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS"[6] BY EXEMPTING FROM THE CONCEDED GENERAL NEED FOR THE LICENSING OF PLUMBERS, RESIDENT SINGLE FAMILY HOMEOWNERS.

The appellant has at no time in this case attacked the desirability or legality of making an exception to the requirement of licensing of plumbers as was done in Section 1.10(c)[7] The appellant has not advocated having Section 1.10(c) struck from the code, even though striking 1.10(c) would, under the conceded general need for licensing of plumbers, require all plumbing be done by licensed plumbers and thereby solve any possible equal protection problem. As-

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sue such calling, or infringing other personal rights guaranteed by the constitution. Under modern systems of house building and disposal of sewage, the dangers to the health of the entire public, arising from defective plumbing, are so great, and at the same time so insidious, that were the state unable to provide for the proper regulation and supervision of the plumber in his work, so as to minimize the danger to the public health from the escape of sewer gas, it would be unable to protect the public life and health in a most important particular . . ."

[6] Amendment XIV § 1, Constitution of the United States.

[7] "§1.10 To Whom Permits May Be Issued

"(c) Any permit required by this code may

suming the need for legislative classification to which the contrary is not suggested by appellant, the only thing left is a general invitation to the United States Supreme Court to draft an exception to the general rule which will be broad enough to encompass the appellant. The *amicus curiae* is inviting the Court to include renters in any drafted exemption. The terms of the proposed classification are vaguely and alternatively defined as evolving around the concepts of commerce, ownership, and, for the first time before this Court, residency.

The legal tests to be applied in determining whether the equal protection clause has been violated just from the authorities cited by appellant are set out in *Morey v. Doud*, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344.[8]

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be issued to any person to do any plumbing or drainage work regulated by this code in a single-family dwelling used exclusively for living purposes, including the usual accessory buildings and quarters in connection with such buildings in the event that any such person is the bona fide owner of any such dwellings and accessory buildings and quarters and that the same are occupied or designed to be occupied by said owner, provided, that said owner shall personally purchase all material and shall personally perform all labor in connection therewith."

[8] "In determining the constitutionality of the Act's application to appellees in the light of its exception of American Express money orders, we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical*

The present regulation is very clear and unambiguous. If the statistics supplied by *amicus curiae* are accurate, 68.5 percent of the single family residences in the state of Washington would fall in the owner-

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of Okla., Inc., 348 US 483, 489, 99 L ed 563, 573, 75 S Ct 461. The rules for testing a discrimination have been summarized as follows:

"'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v Natural Carbonic Gas Co.*, 220 US 61, 78, 79, 55 L ed 369, 377, 31 S Ct 337, Ann Cas 1912C 160.

"To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' *Louisville Gas & E. Co. v. Coleman*, 277 US 32, 37, 38, 72 L ed 770, 774, 48 S Ct 423; *Hartford S.B.I. Ins. Co. v Harrison*, 301 US 459, 462, 81 L ed 1223, 1226, 57 S Ct 838."

occupied exemption.[9] To replace the demonstrated skill of the licensed plumber evident from passing the testing required for licensing, there is the pride of ownership, which would tend to enhance the quality of the work *and* the fact that the plumber will occupy the plumbed premises and thereby subject himself, his immediate family, and normally his closest personal friends who may visit the premises or live nearby, to any risk created by defective plumbing of disease or obnoxious odors and materials.[10]

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[9] Page 8, Brief of Amicus Curiae

[10] See opinion of Washington State Supreme Court, page 6a of Appellant's Jurisdictional Statement, as follows:

"Since it is reasonable to assume that homeowners who do plumbing work for themselves and their immediate families in residences in which they reside or intend to reside, will tend to perform the work more carefully than would those who do plumbing work for strangers, it is reasonable to require certification of the latter class while not requiring certification of the former class. The public health and safety may adequately be protected in the first case by the inherent concern one has for his own welfare and that of his immediate family. This immediate concern may not be present when strangers are to use the premises, and therefore there is no adequate substitute for the certification requirement. We find a logical connection between the object of the legislation, i.e., the protection of the public health and safety, and the requirement that one must intend to live in a residence himself if he is to be issued a permit to do plumbing work without first being examined as to requisite skill and certified as a plumbing contractor."

The suggested concept for an exception based upon ownership alone would in the case of rental property or property being held or built for sale always have the included factor of a commercial basis, i.e., plumbing being done for others.[11] Pride of ownership alone, Snohomish County contends, is not of and in itself a sufficient safeguard, as can be demonstrated by any slum or ghetto landlord in the United States.

Also, a concept of ownership alone would raise numerous due process problems. The right to earn a living as a plumber is entitled to constitutional protection equal to the constitutional protection of property rights. An owner of property who wanted to hire someone to do the work for him would have to hire a licensed plumber. An owner of a large suburban development might not if he did the work himself. Agency problems would develop as to whom the owner would be who could do unlicensed plumbing work when corporate, general or limited partnership, joint ventures, joint tenancies, trusts, or other forms of ownership were involved. Each agency problem would have to be resolved upon a basis that would

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[11] "This conclusion is based upon the reasoning that a property owner who does plumbing for others, i.e. for prospective tenants or purchasers of his property, has a similar impact upon the public to a commercial plumber. He is to some extent carrying on a commercial activity, since plumbing is an integral part of the property he intends to rent or sell." Opinion of Washington State Supreme Court, page 4a, Appellant's Jurisdictional Statement.

make a distinction as to the various forms of ownership so that they each received equal protection of the law, while at the same time assuring that the agents, independent contractors, or employees involved were not themselves denied the equal protection of the law by requiring some to be licensed to plumb and others not to be so licensed.

A concept based on residency alone would not warrant relief to the appellant as he does not fall in the class. The argument of *amicus curiae* in regard to a 20-year lease may well have merit if addressed to the legislative authority of the Snohomish County Commissioners, as it has not been. No showing has been made of the actual impact of such an exception. Possibly, 10-year leases could be included, or 5-year leases. At some point short of tenants at sufferance or month-to-month tenancy, additional protection should clearly be included as the tenant may only be concerned with the minimum expenditure of time and money which will protect himself and his family from any risk of disease or obnoxious results for the balance of his tenancy, which may be one day, five days, or thirty days.

Finally, an exemption based upon "commercial" plumbers alone has been suggested. Black's Law Dictionary, Fourth Edition, defines "commercial" as:

> "Relating to or connected with trade and traffic or commerce in general. 'Zante Currents', C.C.Cal., 73 F. 189. Occupied with commerce. *Bowles v. Co-Operative G.L.F. Farm Products*, D.C. N.Y., 53 F. Supp. 413, 415."

Webster's Third New International Dictionary defines it as:

> "1. of, in, or relating to commerce: as a: occupied with or engaged in commerce . . . b: related to or dealing with commerce . . . c: used in or characteristic of commerce . . . d: suitable to or adequate for commerce . . . e(1): of the kind of quality used in commerce (2): of an average or inferior quality . . . f: produced or productible in large quantities for commerce . . . 2 a: from the point of view of profit: having profit as the primary aim . . . b: sacrificing artistic principles for qualities that bring financial success . . ."

We submit that a distinction based on commercial plumbers would be so vague and indefinite that it would be struck down on that ground and also meaningless and impossible of practical application by a plumbing inspector. Appellant also is connected with commerce as related to the prospective sale or rental of his property.

CONCLUSION

Appellee, Snohomish County, respectfully suggests that appellant clearly has not met his burden as required in the *Morey* case, *supra*, of showing that the classification in the ordinance does not rest upon any reasonable basis and is essentially arbitrary. Appellee prays that the judgment of the Supreme Court of the State of Washington be affirmed.

DATED May 29, 1968.

Respectfully submitted,

ROBERT E. SCHILLBERG
Prosecuting Attorney for
Snohomish County, Washington

JOHN F. WILSON
Special Deputy Prosecuting
Attorney
Attorneys for Appellee